

REMARKS

Claims 1-3, 12-16 and 18-55 are pending. Claims 56-64 are added in this amendment.

The Examiner has objected to claims 1-3 and 55. Applicant has added the punctuation requested by the Examiner.

The Examiner has rejected claims 1-3, 13, 14, 22, 30, 31 and 55 as indefinite. Applicant has amended claims 1, 13, 14, 22, 30 and 31. It is believed that the Examiner's concerns have been fully addressed by this amendment.

Anticipation Rejection Over Apps '874

The Examiner has rejected claims 12-14, 16, 18-31, 33-44 and 50-53 as anticipated by Apps '874. Applicant has amended claim 12 to recite that the second height is greater than the first height and that the first and second heights are determined from uppermost edges of exterior surfaces of the columns. In Apps '874, the uppermost edges of exterior surfaces of the columns would be equal heights above two locations of the side wall. Therefore, claims 12-14, 16 and 18-28 are patentable. Claim 29 has been amended to clarify that the second height is different from the first height. Claim 50 has been amended to recite that the second height is greater than the first height. Again, in Apps '874, the first and second heights are equal.

Obviousness Rejection Over Apps '874 and Kelly and Kappel and Ex. 2

The Examiner has rejected claims 1-3, 15, 32, 45-49 and 54-55 as obvious over Apps '874 and Kelly (Des. 371,239) and Kappel (2,970,715) and Ex. 2 from D.W. Plastics. It is not clear if the Examiner is rejecting the claims in view of all four references in combination, or if the Examiner is making some alternative arguments. In either case, the Examiner's proposed motivation for such a modification is not clear, but is not found in any of the references.

Claims 12-14, 16, 18-23, 26-31, 33-39, 42-44 and 50-53 are not obvious for the same reasons that they are not anticipated as indicated above. Based upon the

Examiner's comments, Applicant understands that the Examiner is not rejecting these claims based upon more than one reference, so the Applicant's arguments stated above are applicable and fully responsive.

The Examiner admits that Apps '874 does not disclose the upper edge and the lower edge having a curved shape. (Office Action mailed September 12, 2003, page 5). The Examiner argues that it would have been obvious to have employed the "integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics in modifying the shape of the lower wall portion . . ." However, there is no "integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics." The Examiner finds (or presumably finds) a different contour or wave-shape in each of these references, not a single, common "integrally molded contoured wave-shape." Just as there is no single, common shape in these references, there is no motivation in any one of them for modifying Apps '874 in the manner proposed by the Examiner.

First, Kelly discloses a wave-shaped side element on the outside of a beverage container case. The side element is spaced from the exterior of the side walls of the container case. The side walls of the container are straight and level, not wave-shaped. Therefore, even if one *were* motivated to modify Apps '874 in view of Kelly (even though there is no evidence of motivation), the side element would be spaced from the exterior of the side walls in Apps '874, which still have straight and level upper and lower surfaces. Therefore, Kelly does not render the claims obvious.

Next, Kappel discloses a curved portion (the Examiner referring to the portion near numeral 31 in Figure 2 of Kappel) below a handle in order to accommodate insertion of a hand. Apps '874 does not include a wall portion below the handle, which is where the curved edge in Kappel is located. There is no motivation for modifying the Apps '874 crate to curve a wall to accommodate insertion of a hand because in Apps '874 it is already completely open below the handle. Viewed another way, there is nowhere to put the curved edge of Kappel in the crate of Apps '874 because there is no wall portion below the handle in Apps '874. Therefore, none of the claims are obvious over Apps '874 in view of Kappel.

The Examiner's use of Ex. 2 from D.W. Plastics is unclear. As is not disputed, the lower edge of the D.W. Plastics wall is straight, not contoured. As

YES, 4 references
 1. Apps
 2. ~~Kappel~~ Kelley
 3. Kappel
 4. Exhibit 2 from D.W. Plastics

Applicant has previously pointed out, The Board of Patent Appeals & Interferences has indicated that modification according to any suggestion from D.W. Plastics would still leave the lower edge of the side wall straight. (Page 8 of Board Decision). Therefore, claims 1, 15, 29 and 54 would not be obvious over Apps '874 in view of Ex. 2 from D.W. Plastics.

Claim 45 specifies that first and second locations directly opposite one another on the upper edges of the two side structural members are vertically offset. Kelly shows a wave-shaped side element spaced away from an exterior of the side walls of a container. Although there is no motivation for making the modification proposed by the Examiner, as explained above, if one *were* to modify Apps '874 in accordance with Kelly (even using hindsight), one would attach the wave shaped side element to the exterior of the side walls of Apps '874, still leaving Apps '874 with straight upper and lower edges. In the present invention as claimed, the wave-shape is the side structural member (for example, claim 45 further specifies that the side structural members are "defining an inner compartment with the floor structure"). Therefore, Claim 45 is patentable.

Claims 16 and 33 recite a plurality of retaining tabs that attach the side structural members to the floor structure. Apps '874 does not disclose these tabs, nor would they be obvious in view of the cited references. Therefore, claims 16 and 33 are independently patentable.

For claims 24, 25, 40 and 41, it appears that the Examiner is calling walls 29 of Apps '874 part of the columns. This is contrary to the plain and ordinary meaning of the term "columns." The columns of Apps '874 are spaced away from the floor. Therefore, claims 24, 25, 40 and 41 are independently patentable.

Obviousness Rejection Over Apps '874 and Sauey

The Examiner has rejected claims 24, 25, 40 and 41 as obvious over Apps '874 in view of Sauey (U.S. Patent No. 2928530). There is no motivation for this proposed modification to App '874. The Examiner's proposed motivation is "to prevent the contents from slipping through an opening." However, this motivation is not found in either Sauey or Apps '874.

Additionally, Sauey is a box for shotgun shells. One of ordinary skill in the art in beverage cases would not look to shotgun shell boxes for suggestions for modifying low-depth beverage cases. For example, Apps '874 makes provisions for making sure that the empty beverage cases will nest to reduce their stacked height because beverage cases are frequently reused. In particular, Apps '874 indicates that the purpose of the gap between the floor and columns is to accommodate stacking (and partially nesting) without having to taper the columns. (Apps '874 column 6, lines 44-52). In contrast, the shotgun shell box of Sauey cannot nest and makes no provisions for stacking empty boxes at a reduced stacking height. It would be contrary to the stated purpose in Apps '874 to extend the columns down to the floor, as this would interfere with stacking the empty cases at a reduced height without tapering the columns. Therefore, claims 24, 25, 40 and 41 are independently patentable.

Even if Apps '874 were so modified in accordance with Sauey, the columns would not extend down below the lower edge of the side structure as required by claims 25 and 40. The columns in Sauey do not extend below the sidewalls.

Double-Patenting Rejections

The Examiner has not set forth a *prima facie* case of double-patenting. The fact that these claims contain some common subject matter as some claims in other patents and patent applications is insufficient. The particular "common subject matter" recited by the Examiner in this case is "A stackable low depth case comprising side walls, end walls, bottom, pylons and columns" - - features that are also found in the prior art.

Despite the number of double-patenting rejections by the Examiner, the Examiner presents a *prima facie* case of obviousness for none of the claims in the present application. The Examiner does not explain why these claims would be obvious in light of any of the previously-patented or co-pending claims.

The Examiner cites *In re Schneller*. That case describes a *rare* type of double-patenting rejection (MPEP 804 (II)(B)(2)) and is not applicable here. Further, "approval of the [Examiner's SPE and] TC Director must be obtained before such a nonstatutory double-patenting rejection can be made." There is no

indication that such approval was obtained here. Therefore, for this additional reason, the double-patenting rejections should be withdrawn.

New claims

New independent claims 58, 59, 60 and 64 recite columns of differing heights relative to the lower edge of the side wall or a curved lower edge of the side wall. Again, the Board has indicated that modification according to any suggestion from D.W.-Plastics would still leave the lower edge of the side wall straight. (Page 8 of Board Decision). Therefore these new claims are patentable over the cited prior art.

CONCLUSION

Reconsideration is requested. Please charge \$506 to Deposit Account No. 50-1984 for four additional independent claims and nine claims total in excess of twenty. If any additional fees are due, please charge Deposit Account No. 50-1984.

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Respectfully submitted,



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Dated: December 12, 2003